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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/939,237	08/24/2001	Raul Victorino Nunes	8270	3412

27752 7590 11/08/2004

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EXAMINER

PRATT, HELEN F

ART UNIT PAPER NUMBER

1761

DATE MAILED: 11/08/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/939,237

Applicant(s)

NUNES ET AL.

Examiner

Helen F. Pratt

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 02 September 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 17-20, 22 and 25-27 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 17-20, 22, 25, 26, 27 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim 17 is rejected under 35 U.S.C. 102(b) as being anticipated by Chen et al. (EP 1106174A1 – applicant's IDS).

Chen et al. disclose a beverage composition containing arabinogalactan and vitamins A, D and E as in claim 17 (abstract and page 3, lines 57, page 4, lines 35-41). Claim 17 has been amended to require particular amounts of water in a beverage composition. Chen discloses the use of arabinogalactan in a beverage containing more than 50% water (page 5, lines 30-45).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 17, 18,19-20, 22, 25-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over McAnalley in view of Chen et al. (EP 1106174A1).

McAnalley discloses a composition as in claim 17 containing arabinogalactan in amounts within the claimed range as in claim 18 and vitamins A, D and E. (page 18,

Art Unit: 1761

lines 1-18, page 19, lines 9-15, page 30, lines 14-18 and page 14, lines 16-20). The composition is seen to be a beverage in that it can be a liquid (page 14, lines 16-24). Claim 17 has been amended to require that the beverage is a ready to drink composition and contains at least 50% water. However, the reference discloses that the supplement can be in the form of a liquid (page 14). Applicants' specification on page 35, lines 5-14) discloses that the composition can contain from zero to 99.999% water, and about 4% water, up to the preferred amounts of 50 and 80% water. Nothing critical is seen in the use of the claimed amount of water. In addition, Chen discloses the use of arabinogalactan in a beverage containing more than 50% water (page 5, lines 30-45, page 11, lines 40-55). No patentable distinction is seen at this time between a liquid as disclosed by McAnalley and a beverage because no particular ingredients are disclosed as to the composition of the beverage. The dry composition is for adding to a liquid as in Chen. The other ingredients in McAnalley have not been excluded from the composition. Therefore, it would have been obvious to make a beverage composition containing a known stabilizer such as arabinogalactan as shown by McAnalley containing particular amounts of water as shown by Chen.

Claim 19 requires that arabinogalactan (AG) should be in a range from 0.001% to 15% of the composition. Chen discloses that gums can be used in amounts of about 5% in an aqueous solution, and, in particular, in the matrix of the reference, which includes only the gum and the vitamins in amounts from 25-99% of the matrix (page 4, lines 1-4 lines 52-60). This matrix is then mixed with water to make a beverage or with other dry ingredients to make powder. The amount of the matrix containing powder

Art Unit: 1761

depends on the potency of the powder (page 6, lines 28-18-30). Since Chen discloses that most gums can be used in amounts of about 5%, this amount of gum in the entire composition is seen to yield an acceptable composition. Therefore, it would have been obvious to use AB in amounts of 5% in the composition of McAnalley because 5% of a gum is a known acceptable amount as shown by Chen.

The arabinogalactan can be from the larch tree as in claim 20 and can be a dry composition as in claim 21 (Chen, page 14, lines 16-20, page 8, line 10, McAnalley, page 14, lines 16-19). Therefore, it would have been obvious to use known sources of AB in the composition of McAnalley as disclosed by Chen and to use a dry composition as disclosed by Chen and McAnalley.

Claim 22 further requires particular amounts of vitamins and claim 25 requires a lower level of vitamins. McAnalley discloses "nutritionally effective" amounts of the vitamins (page 13, lines 30-34). Chen discloses a dry or an aqueous composition, which contains fat- soluble vitamins as claimed in amounts within the claimed amounts in amounts which are nutritionally supplemental to obtain the desired amount of fortification in a liquid (page 6, lines 10-28, page 40, lines 40-45). If one requires a nutritional supplemental amount of vitamins, this is seen as another way of saying a nutritionally effective amount because both have the goal of adding enough vitamins to a beverage to provide enough of the vitamins so that the vitamins can be nutritionally effective in the body. Therefore, it would have been obvious to one of ordinary skill in the art to use known amounts of fat-soluble vitamins as disclosed by Chen in the process of McAnalley who uses "nutritionally effective amounts" of the vitamins because

Art Unit: 1761

Chen discloses what would have been a supplemental amount to fortify a liquid, which is also seen as being a nutritionally effective amount.

Claim 26 further requires a particular pH in the dry beverage. The combined references do not disclose a particular pH. However if the composition is dry or aqueous it is seen that it would have been within the claimed range, because the examples disclose a composition, which contains fruit juice, yogurt or cola beverages, which have acidic pH's and also a cow's milk, which is more alkaline and has a pH near 7 (Chen page 11, lines 40-55). Therefore, it would have been obvious to make the composition have an acidic pH up to an alkaline pH as shown by Chen in the composition of McAnalley since beverages with these pH's are known as shown by Chen.

Claim 27 requires beta-carotene and E acetate and claim 28 requires only the use of vitamins A and E. McAnalley discloses the use of beta-carotene (page 30, lines 15-19). Chen discloses the use of E acetate (page 5, lines 45-48). Therefore, as E acetate is a known form used in dry and aqueous beverages as shown by Chen, it would have been obvious to use this form in the composition of McAnalley.

ARGUMENTS

Applicant's arguments filed 9-2-04 have been fully considered but they are not persuasive. Applicants argue that the dietary supplements of McAnalley are taught as capsules, tablets or powder. However, as above, the reference is not limited to such. The arguments as to the liquid of McAnalley not being a beverage are not persuasive since McAnalley is now being used with Chen. It is not seen that the liquid of McAnalley

Art Unit: 1761

is intended for topical use only since it is a dietary supplement. In addition, no patentable distinction is seen at this time between a liquid as disclosed by McAnalley and a beverage because no particular ingredients are disclosed as to the composition of the beverage. The dry composition is for adding to a liquid. The other ingredients in McAnalley have not been excluded from the composition.

Applicants argue that McAnalley requires the inclusion of water-soluble vitamins and minerals. However Applicants claims are open comprising type claims which do not exclude water soluble vitamins and minerals.

Applicants argue that Chen does not teach a beverage containing 50% water since the beverages are reconstituted from a powder. However, Applicants claims are to a composition and even if a powder was added to water, the composition has been shown as above.

Applicants argue that there is no reason to combine McAnalley and Chen because McAnalley focuses on composition in the form of tablets and capsules and Chen focuses on powders. However, as above McAnalley is not limited to tablets and capsules, and Chen does disclose a beverage composition and discloses how much water could be added to make a beverage.

Applicants argue that the beverages are formulated to overcome problems of sedimentation and off-flavors. However, claim 17 contains no amounts at all. And claim 22 contains zero amounts of the ingredients. In addition, problems of sedimentation are very common in beverages, which is why stabilizers such as arabinogalactan are used. Certainly, it would have been within the skill of the ordinary

Art Unit: 1761

worker to formulate the beverage so that off-flavors do not occur as this involves using particular amounts.

It is not agreed as applicants argue that a liquid is not a beverage. Applicants do not claim any ingredients to define a beverage.

Applicants argue that putting a powder into a liquid does not make their invention. However, applicants' claims are not method claims and the composition has been shown above.

Applicants argue that it would not have been obvious to use 5% of a gum because the references do not use 50% water. This is not seen as Chen does disclose such an amount as in the art rejection.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Art Unit: 1761

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

HP 11-3-04

H. Pratt
HELEN PRATT
PRIMARY EXAMINER